LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U.S.
SEP 3 1970

IN THE

Supreme Court of the United States

October Term, 1970

No. 642

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN S. MARTIN, JR.
Attorney for Petitioner
10 East 40th Street
New York, New York 10016

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	8
Appendix:	
Opinion of the Court of Appeals	1a
Order Denying Petition for Rehearing	9a

IN THE

Supreme Court of the United States

October Term, 1970

No. .....

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Albert Mengarelli petitions for a writ of certiorari to review the judgment of The United States Court of Appeals for The Ninth Circuit in this case, entered on May 12, 1970.

Opinion Below

The opinion of the Court of Appeals (App. pp. 1a-8a, *infra*) is not yet reported.

Jurisdiction

The opinion and judgment of the Court of Appeals was entered on May 12, 1970, and on July 9, 1970, the Court of Appeals denied a timely petition for rehearing (App. p. 2a, *infra*). On July 30, 1970, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including September 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether an employee can validly consent to the search and seizure of the contents of a box belonging to his employer which is stored in the employee's home?

2. Whether a party who asserts his Fifth Amendment rights in response to questioning by federal agents and who is then taken to his home by two armed agents can be said to have "voluntarily consented" to a search and seizure at his home?

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on a one count indictment charging him with participating in a conspiracy to evade the payment of a substantial part of the 10% excise tax due and owing on wagers accepted at the Rendezvous Race and Sports Book in Las Vegas, Nevada, a business which he operated with his partner Keith Richards.

The government's evidence consisted almost exclusively of the testimony of agents of the Internal Revenue Service concerning their observations of the operations at the Rendezvous Race and Sports Book, as well as, their identification and analysis of certain Rendezvous records which they had seized.

According to these agents, wagers were accepted at the Rendezvous in either of two forms. Tourists and other casual customers of the Rendezvous placed their bets by orally giving the information to a clerk who would write this information on a printed ticket, date and time stamp the ticket, return a carbon copy to the customer and collect from the customer the amount of the wager plus the 10% excise tax. Certain regular customers followed a different procedure; they simply wrote out their bets on white slips of paper, which were readily available on the premises, and gave these white slips of paper together with the money for their bet to one of the Rendezvous employees.

It was the government's theory that the 10% excise tax was not paid on the wagers which were placed by the regular customers on the white slips. To support this theory, the government introduced charts showing that

during the period April 1965 through January 1966 the total amount of wagers reported to Internal Revenue was almost identical with the total amount of wagers reflected on the Rendezvous' printed tickets for the same periods. In addition, the government introduced a chart showing that during the week of February 12-18, 1966, the total amount of bets placed on white slips was $70,762* and the total amount placed on printed slips was $14,067.

Among the records used in compiling the chart relating to the week of February 12-18 was a box of wagering slips belonging to petitioner and his partner which had been seized without a warrant from the home of one of petitioner's employees where they were stored. The agent who seized these records testified that in the course of executing a search warrant at the Rendezvous Race and Sports Book on February 19, 1966, he attempted to question one of petitioner's employees, Harold Kline, but Kline refused to answer some of the agent's questions on the ground that the answers might tend to incriminate him. Two armed agents then accompanied Mr. Kline to his house where they seized and removed a box containing records belonging to petitioner and his partner. The agent admitted that at the time he seized these records he knew they belonged to petitioner and his partner, and that Kline had no proprietary interest in the records. The agent also testified that he had no idea whether Kline was authorized to release these records. The trial court admitted these records into evidence over defense counsel's objection that the search and seizure were illegal because Kline did not have authority to consent to the seizure and, in any event, Kline had not voluntarily consented to the search and seizure.

* The government did not claim that the white slip bets for this period were not reported to Internal Revenue.

Reasons for Granting the Writ

In *Chimel* v. *California*, 395 U.S. 752, the Court curtailed substantially the power of law enforcement officers to search without a warrant on the theory that the search was "incidental" to an arrest. There now remains only one major area in which law enforcement officers can engage in extensive searches without a warrant, that is, where there is a "consent" to the search. Whereas before *Chimel* law enforcement officials relied on "incidental searches" to justify proceeding without a warrant, it is not unreasonable to assume that in the wake of *Chimel* there will be an increase in the already substantial number of cases in which there is a claim that the search was preceded by "consent".

This case presents two important issues relating to the constitutionality of "consent" searches on which there is a conflict among the circuit courts which should be resolved by this Court. The first concerns the ability of a third party to waive the rights of a criminal suspect by consenting to a search and seizure of the suspect's property. The second relates to the standards to be applied to determine whether a consent was truly voluntary.

I.

In *Stoner* v. *California*, 376 U.S. 483, this Court rejected an argument that a hotel clerk could validly consent to the search of the defendant's hotel room stating, *id.* at 488:

> "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'."

See also *Chapman* v. *United States*, 365 U.S. 610.

Despite this pronouncement in *Stoner* the circuit courts have reached conflicting results in attempting to determine when a third party can consent to a search which is directed at a criminal suspect. *Compare Niro* v. *United States*, 388 F. 2d 535 (C.A.1); *United States ex rel. Reeves* v. *Warden*, 346 F. 2d 915 (C.A.4); *Holzhey* v. *United States*, 223 F. 2d 823 (C.A.5); *United States* v. *White*, 405 F. 2d 838 (C.A.7), cert. granted, 394 U.S. 957, case restored for reargument 396 U.S. 1035, *with* the decision below and *United States* v. *Botsch*, 364 F. 2d 542 (C.A. 2) cert. denied, 386 U.S. 937. See also *State* v. *Evans*, 45 Hawaii 622, 372 P. 2d 865; *Hinchcliff* v. *Clark*, 371 F. 2d 697 (C.A. 6) cert. denied, 387 U.S. 941; *Lord* v. *Kelley*, 223 F. Supp. 684 (D. Mass.) appeal dismissed, 331 F. 2d 742 (C.A. 1) cert. denied, 379 U.S. 961; *United States* v. *Ruffner*, 51 F. 2d 579 (D. Md.) *United States* v. *Lagow*, 66 F. Supp. 738 (S. D. N.Y.), affirmed, 159 F. 2d 245 (C.A. 2), cert. denied, 331 U.S. 59.

The existing conflict is most readily found in contrasting the decision below with several cases presenting closely analogous factual situations. Here petitioner's employee was held to have waived petitioner's Fourth Amendment right to be secure in his "papers and effects" when the employee allegedly consented to the search of a box containing petitioner's records which was stored in the employee's home. This result is in direct conflict with the Fifth Circuit's decision in *Holzhey* v. *United States*, *supra*, where it was held that a man and woman who owned a house could not consent to a search of a cabinet in their home which belonged to the woman's mother. Similarly, in *United States ex rel. Reeves* v. *Warden*, *supra*, the Fourth Circuit held that a mother could not consent to the search

of a bureau set aside for the exclusive use of her son. See also *Simmons* v. *United States*, 390 U.S. 377, 391.

The existence of a conflict among the circuits on the question of third party consent has been noted by both federal and state courts. See *Anderson* v. *United States*, 399 F. 2d 753 (C.A. 10); *Commonwealth* v. *Wright*, 411 Pa. 81, 190 A. 2d 709. At least one writer has noted, "It is essential for the Supreme Court to make a prompt and final determination of this issue." Bender, *Third Party Consent to Search and Seizure: A Request for Re-evaluation*, 4 Crim. L. Bull. 343 (1968).

The Court presently has before it the issue of third party consent to the overhearing of a conversation by means of electronic surveillance. *United States* v. *White*, restored for argument 396 U.S. 1035. It would seem appropriate, therefore, for the Court to grant the petition for certiorari in this case and set the matter down for argument with *White* so that it might also consider the analogous problems of third party consent to the search and seizure of physical objects that is presented here.

II.

In *Amos* v. *United States*, 255 U.S. 313 and *Johnson* v. *United States*, 333 U.S. 10, the Court established the principle that a search without a warrant could not be sustained on the basis of "consent" when the evidence showed only that there had been a submission to the authority of law enforcement officers. In *Bumper* v. *North Carolina*, 391 U.S. 543, 548-549, the Court stated:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search he has the burden of proving that the consent was in fact freely and voluntarily given".

In direct conflict with these pronouncements the court below found that Kline, who had asserted his Fifth Amendment privilege in response to questioning by the Internal Revenue agents and who was then accompanied to his house by two armed agents, voluntarily consented to the agents' search and seizure of a box of records stored there by his employer.

Here again, the circuit courts have reached clearly conflicting results in determining when a consent to search is truly voluntary and when it represents no more than a submission to authority. *Compare* the decision below and *Gorman* v. *United States*, 380 F. 2d 158 (C.A. 1); *United States* v. *Jordan*, 399 F. 2d 610 (C.A. 2) cert. denied, 393 U.S. 1005; *United States* v. *Vickers*, 387 F. 2d 703 (C.A. 4); *United States* v. *Ziemer*, 291 F. 2d 100 (C.A. 7) cert. denied, 368 U.S. 877; *Drummond* v. *United States*, 350 F. 2d 983 (C.A. 8) cert. denied, 384 U.S. 944, *with United States* v. *Marrese*, 336 F. 2d 501 (C.A. 3); *Pekar* v. *United States*, 315 F. 2d 319 (C.A. 5); *Rosenthal* v. *United States*, 389 F. 2d 514 (C.A. 6); *Weed* v. *United States*, 340 F. 2d 827 (C.A. 10); *Judd* v. *United States*, 190 F. 2d 649 (C.A.D.C.).

Since the question of the validity of consent searches is one that has arisen often in the past and, in light of *Chimel*, will no doubt arise with greater frequency in the future, the Court should grant the petition in this case to resolve the existing conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN S. MARTIN, JR.
Attorney for Petitioner

APPENDIX

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 24,585

ALBERT MENGARELLI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

Filed: May 12, 1970

Before: HAMLEY and WRIGHT, Circuit Judges, and SMITH,* District Judge

SMITH, District Judge

Appellant, who with his partner Richards, operated the Rendezvous Race Book in Las Vegas, Nevada, was convicted of a conspiracy[1] to evade or defeat the federal excise taxes imposed upon wagers.[2]

* The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

1. 18 U.S.C. §371.
2. 26 U.S.C. §4401 et seq.

Appellant contends that his Fifth Amendment rights were violated under the doctrines of *Grosso* v. *United States*, 390 U. S. 62 (1968) and *Marchetti* v. *United States*, 390 U. S. 39 (1968). These cases hold no more than that under the circumstances of them a person who properly invokes his Fifth Amendment rights may not be criminally prosecuted for failing to provide the information or to pay the tax required by the wagering tax statutes. Appellant did not rely on his Fifth Amendment rights. Rather he engaged in a calculated course of deceit which if successful would have enabled him to avoid any of the problems associated with a claim of privilege. One who engages in this form of self help does not properly invoke constitutional protection.

In *Dennis* v. *United States*, 384 U. S. 855, 867 (1966) the Supreme Court announced the rule that "a claim for unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." *Bryson* v. *United States*, 36 U. S. L. W. 4011 (U. S. Dec. 8, 1969), reaffirmed *Dennis* and *United States* v. *Knox*, 38 U.S.L.W. 4016 (U. S. Dec. 8, 1969) applied the rule to the assertion of a claim of privilege under the Fifth Amendment in a case[3] involving false information given in connection with the wagering tax statutes. We are unable to distinguish *United States* v. *Knox*, *supra*, on the ground that *Knox* dealt with Section 18 U.S.C. §1001 forbidding the making of false statements to agencies of the United States, while this case deals with conspiring to defeat a tax. In neither case is the prosecution based on a failure to furnish information. Without some element of deceit there is no crime in either case but once the ele-

3. 18 U.S.C. §1001.

ment of deceit appears then the fact that the government ought not to have asked the question or required the act is not a defense (*Bryson* v. *United States, supra*) whatever the form of the statute forbidding the deceit.

In a free swinging and loosely aimed argument appellant urges that the evidence was insufficient to warrant a conviction. With this we do not agree. The evidence was sufficient to show without dispute that:

The Rendezvous Race Book accepted bets on horse races and sporting events. Bets were made in two ways, one in which the patron paid the wagering tax and the other in which he did not. In those cases where the tax was paid the patron would orally place the bet with a clerk who would collect the amount of the bet plus the ten per cent tax. The clerk would than write the selection and the amount of the bet on a ticket, machine stamp it, with the date, time and a number and issue a duplicate to the patron. Some of the regular patrons who did not pay the tax were permitted to write the information as to their bets on plain white tickets. These tickets with cash in the amount of the bet only would be given to the clerk who did not put the information on the printed tickets and who did not issue to the customer any receipt or duplicate of any kind. A substantial[4] part of the business of the Rendezous Race

4. Appellant urges that it was not shown that any substantial amount of tax was evaded. From observations conducted by treasury agents over a period of many months it appeared that a substantial portion of the business of the Book was done on the white slips. When the records of the Book were seized white slips for but one period of seven days in February, 1966, were found. The wagers shown on them totaled $70,762.00 as against total wagers of $84,829.00 for that period. The Government could not claim that the tax had been evaded on the $70,762.00 because tax returns for February, 1966 filed after the defendants know of the investigation, disclosed the totals on both the white and printed slips. The volume of bets shown on these white slips (the only ones seized) did tend to confirm the testimony of the government agents that the white slip bets were substantial.

Book was done on the white slips and it is clear from the evidence not only that the patron did not pay the tax on the white slip wagers but that the Book itself did not. The tax returns filed (except for the month of February, 1966) disclosed wagers in almost the exact amount reflected on the printed tickets. The evidence leaves no doubt but that the Rendezvous Race Book did evade the tax on a substantial portion of its business and was operated in a manner calculated to accomplish that purpose.

Appellant and his partner were in personal charge of the operation. They could not avoid knowing what was being done by their customers and employees with the white slips and they personally sorted and otherwise dealt with them. Richards generally signed most of the tax returns but on at least two occasions appellant signed them. There was no proof of a specific written or oral agreement to evade the law, but from what was done, coupled with the partner's proximity to the business it could be fairly inferred that the partners had deliberately organized their operations so that by means of what they and the employees did the white slip scheme was used to conceal from the government substantial numbers of bets on which no tax was paid. No more was needed to prove the conspiracy and the overt acts alleged in furtherance of it.

Exhibit No. 14, a box of the printed Rendezvous Race Book slips, was introduced in evidence over appellant's objection that the exhibit had been illegally seized. In February, 1966, the agents of the Internal Revenue Service executed a search warrant describing the premises of the Rendezvous Race Sports Book. They interviewed one Harold Kline, a cashier, and from him learned that he had some of the records in his home. The officers had sidearms

and did question Kline who refused to answer on Fifth Amendment grounds. Kline accompanied the officers to his home and turned the records over to the agents. Despite an order made on May 1, 1968, directing that any pre-trial motions be made by June 28, 1968, it was not until the trial, which commenced in February, 1969, that the attention of the court was called to the claim of illegal search and seizure. The Court admitted the evidence, subject to a post-conviction motion to suppress.

At the hearing of the post-trial motion to suppress, appellant produced no evidence and relied upon the trial record. The United States produced evidence bearing upon appellant's pre-trial knowledge of the Government's possession of Exhibit 14. The trial court found that the motion to suppress was not timely. Without comment as to the timeliness of the motion to suppress we affirm the Court's finding that Kline did have authority and that the records were not secured by an unreasonable search and seizure.

Apart from the fact that Kline was a cashier and did have the records, there is no evidence of his authority. Appellant in his motion to suppress asserted Kline's lack of authority but made no effort to produce evidence in support of that assertion. Exhibit 14 consisted of records which appellant was required to keep and have available for inspection under Nevada law.[5] They were not records which disclosed any illegal activity. These were the records which in any sort of an audit or inspection the Rendezvous Race Book would have produced to prove compliance with state

5. Regulation 5020(3) Nevada Gaming Commission adopted pursuant to specific statutory authority. N.R.S. §463.157).

and federal law.[6] Under these circumstances we believe that the trial court was justified in inferring Kline's authority to deliver Exhibit 14 to the Government.

If, however, the inference is impermissible and the Government failed to sustain its burden of proving a valid consent,[7] still the records were not secured by reason of an unreasonable search and seizure. The Constitution condemns only unreasonable searches. It was said in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) that what is unreasonable is not determined by any fixed formula, and although the authority of *Rabinowitz* is diminished by *Chimel* v. *California*, 395 U. S. 752 (1969), the rule still seems to be that the reasonableness of a search depends upon the facts and circumstances—the total atmosphere of the case—viewed in the light of established Fourth Amendment principles. There can be no question but that probable cause did exist for the search. No attack was made upon the validity of the warrant and it must be presumed that a magistrate had an opportunity to appraise that cause. On the authority of the warrant the internal revenue agents had lawful authority to seize the records at the Rendezvous Race Book. By reason of some unexplained course of dealing between the appellant and his employees the business records which would normally be expected to be at the place of business were not there but were in Kline's home. Whatever Kline's authority may have been, if he had authority to take the records he most certainly had authority to bring them back. Had he been requested to bring the records to the Book and had they

6. The regulation required Book to collect the federal tax from the player and maintain a record showing such collection.

7. See Bumper v. North Carolina, 391 U.S. 543 (1968).

been seized there, then the seizure would have occurred under the protective umbrella of the warrant. The officers did not invade Kline's home nor did they compel the delivery of the records. If the officers were at fault, the fault was in their failure to discern a difference (if there was a difference) between the authority of Kline to deliver the records to the Book where they might have been seized, rather than to turn them over at his home. In the atmosphere of the whole case we cannot believe that this failure rendered the taking of the records unreasonable.

We bear in mind that the rule which excludes evidence unconstitutionally secured has a prophylactic purpose—to discourage public officers from flouting the Constitution. In *Elkins* v. *United States*, 364 U. S. 206, 217 (1960) the Supreme Court stated the basic postulate of the exclusionary rule:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

We think it proper in determining what is reasonable in the atmosphere of a given case to determine whether the conduct of an officer is such that some sanction should be imposed on account of what that officer has done. Where, as here, the officer's wrong was at most questionable misappraisal of an agent's authority, we think that the sanction of exclusion should not be imposed.

The case differs from the cases where the consent was given by a landlord or hotel clerk.[8] In those cases the basic possession of the place searched and the thing seized

8. See *Chapman* v. *United States*, 365 U. S. 610 (1961); *Stoner* v. *California*, 376 U.S. 483 (1964). *Lustig* v. *United States*, 338 U.S. 74 (1949); *United States* v. *Jeffers*, 342 U.S. 48 (1951).

was not in the landlord or clerk; there was no entrusting of the thing seized to the landlord or the clerk; an officer would have no reason to believe that the landlord or clerk had any authority to deliver the tenant's or guest's personal property to the Government.

We have considered the other contentions made by appellant and we find no merit in them. We think it would serve no useful purpose to set out obviously untenable contentions and then dispose of them by elucidating the obvious.

Appellant was properly tried and convicted and the judgment is affirmed.

.....
Circuit Judge

.....
Circuit Judge

.....
District Judge

Order Denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 24,585

UNITED STATES OF AMERICA,

Appellee,

v.

ALBERT MENGARELLI,

Appellant.

ORDER

Before:

HAMLEY and WRIGHT, Circuit Judges, and SMITH, District Judge*

The petition for rehearing is denied.

Dated: July 9, 1970

Filed: July 9, 1970

.....

United States Circuit Judges

.....

United States District Judge

* The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.